Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

MICHAEL C. VINYARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Petitioner seeks writ to contest the Fourth Circuit Panel's decision to expand the scope of the offense of mail fraud under 18 U.S.C. §1346 to include those acts which occur in a private business context so that conviction is permissible even if no actual economic harm occurred to the alleged victim. Such decision is in conflict with the decisions of other Circuit cases. Mail fraud prosecuted under 18 U.S.C. §1346, requires either the loss of property or money or the loss of honest services of an employee. If there is no actual loss of property or money, the only claim can be loss of honest efforts of an employee. This is a case of private sector employment and without actual loss, the loss of services of an employee is not of the kind anticipated under the mail fraud statute. The decision, also seeks to adopt a new legal standard, the use of a "reasonable foreseeablity" test. This test improperly shifts the elements of proof necessary for a conviction of mail fraud and is in conflict with standards adopted by other circuits.

2. Petitioner seeks writ to contest the Fourth Circuit's failure to give proper consideration to the multiple incidents of prosecutorial misconduct which lead to his being denied a fair trial. This decision and its failure to address such misconduct is in conflict with recent cases of the Ninth Circuit Court of Appeals. Specifically, that Government Counsel had in his possession, documents which demonstrated that the chief witness against the Petitioner was committing perjury. That said counsel did not release said documents to the Petitioner, even through proper request had been made, and instead, engaged in specific acts of misconduct to sponser such perjuried

testimony as such testimony was required for conviction.

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STATEMENT OF JURISDICTION

Indictment was returned against the Defendant-Appellant, charging him with 20 Counts of Mail Fraud in violation of Title 18 U.S.C. §1341, 1346, and 12 Counts of Money Laundering in violation of 18 U.S.C. §1956(a)(1)(B(i) and 2. Appeal was denied by the Fourth Circuit Court of Appeals on September 11, 2001. Petitioner made application for rehearing and rehearing en banc which was denied by the Fourth Circuit on October 10, 2001.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any

such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

On May 5, 1999, Petitioner was indicted in the District of South Carolina with 20 Counts of Mail Fraud in violation of Title 18 U.S.C. §1341, 1346 and 2, and 12 Counts of Money Laundering in violation of 18 U.S.C. §1956(a)(1)(B(i) and 2. Trial by jury commenced on August 24, 1999, with the Honorable Cameron M. Currie, United States District Judge for the District of South Carolina presiding. Verdict was returned on August 26, 1999, with the Petitioner, hereinafter Michael Vinyard, being convicted of one count of Mail Fraud and one count of Money Laundering. Sentencing was held on May 24, 2000, with Judgment entered on June 5, 2000. Notice of Appeal was timely filed on June 6, 2000. The appeal was denied on September 11, 2001, and petition for rehearing and hearing en banc was denied on October 10, 2001.

STATEMENT OF THE FACTS

Michael Charles Vinyard was a practicing attorney in Ottumwa, Iowa. In the fall of 1990, Michael received a call from his only brother, James Stewart Vinyard, which

was to change his life. James Vinyard was, at the time, working for a company known as Sonoco Products Company, hereinafter Sonoco, in the High Density Film Products Division. His division was responsible for manufacturing plastic grocery bags. During August of 1990, this division began to explore the use of recycled plastic as a method of lowering costs. James began to discuss this concept with other Sonoco executives who came to the conclusion such business should be handled through a broker. This broker was to initiate contacts in the industry and to develop resin manufacturers and bag manufacturers/converters to develop sources for scrap and/or recycled resin needed for the manufacture of grocery bags.

On September 24, 1990, Harris DeLoach, executive with supervision over the High Density Film Products Division approved the concept outlined above. However, it was decided that Sonoco wanted to have these tasks performed outside of the company so that they would not have to create a position in-house and have the costs of such a position. It was also decided that because Sonoco did not want it known in the industry or to the consumers that they were using scrap or recycled material, a broker would aid in maintaining confidentiality. James Vinyard was given the responsibility of locating such a broker and working with him.

With these instructions, James Vinyard made that fateful phone call informing his brother that they were going into business together. Michael, who had no knowledge of the plastic's industry, was informed that they were going to be plastic brokers and that James would teach him all he needed to know. James stated that Sonoco wanted to get into the recycling business and that he had been directed by Sonoco to set up some sort of program,

using a broker or outside party to go into the marketplace and obtain these products. James said that Sonoco didn't want to do this brokering in-house because of the cost of setting up another department and the related costs of employees to man that operation. James stated that confidentiality was the key and that Sonoco did not want anyone finding out that they were dealing in scrap or recycled material instead of virgin resin. James claimed that if the competitors knew of this they would use it against Sonoco in the marketplace.

With these criteria in mind it was decided to create Charles Stewart Enterprises. Charles Stewart Enterprises, hereinafter CSE, was created as a corporation in the State of Iowa for the purpose of acting on Sonoco's behalf to obtain recycled resin thus ensuring confidentiality. James told Mike that the name Vinyard was already known to suppliers and to competitors and that he was afraid that use of his name would permit competitors to make the connection to Sonoco. So at James request, Michael Vinyard incorporated CSE using his law partner Patrick Curran as incorporator and listed him as the principal officers.

CSE had a clear division of labor. James made all the contacts, did all the deals, dealt with all the people at Sonoco and handled all questions about CSE. Michael provided the physical location for the phone line and fax machine and provided secretarial support to fill out invoices and checks as needed. CSE was supposed to be a short term project with James indicating that he believed Sonoco would eventually take over the project in-house once the profitability was demonstrated. To keep Michael believing that he had the full support of Sonoco, James would send internal memos to Michael showing that Sonoco was aware of the activities of CSE and the profit to be had by doing the same work in-house.

During the course of operation, CSE had an adjusted earnings for the period 1992 to 1997 of $2,784,946.50. During this same period, in this division alone, Sonoco had before tax profits of $136,501,720.81. At least $4,095,051.62 in profits which were due to the use of non-virgin resin, collected and arranged by CSE. On these facts Michael Charles Vinyard went to trial and was found guilty.

ARGUMENT

I. Improper expansion of the mail fraud statute.

Michael Vinyard was charged under 18 U.S.C. § 1346, which provides that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme to deprive another of the intangible right of honest services." However, § 1346 has not been interpreted to expand broadly the reach of the mail fraud statute, especially in the context of acts which allegedly deprive a private entity of a right to services. In United States V. Frost, 125 F.3d 346, 365 (6th Cir. 1997), the court stated as follows with respect to § 1346:

> "The right of the public to the honest services of its officials derives at least in part from the concept that corruption and denigration of the common good violates "the essence of the political contract." . . . Enforcement of an intangible right to honest services in the private sector, however, has a much weaker justification because relationships in the private sector generally rest upon concerns and expectations less ethereal and more economic than the abstract satisfaction of receiving "honest

services" for their own sake." *Id* at 365.

After recognizing that there might be some situations where a private employer's deprivation of a right to honest services could be the basis for a mail fraud prosecution under § 1346, the court held that those situations were limited as follows:

> "The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach. We therefore adopt the standard employed by the District of Columbia Circuit, which holds that an employee deprives his employer of honest services when "the defendant might reasonably have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict along with any other information relevant to the transaction." United States v. Lemire, 720 F.2d 1327,1337 (D.C. Cir. 1983). Proof that the employer simply suffered only the loss of the loyalty and fidelity of the defendant is insufficient to convict. *Id* at 368.

This limitation upon the application of "honest services" type mail fraud prosecutions in the private commercial setting is reflected in many other decisions. For example, in United States v. Cochran, 109 F.3d 660 (10th Cir. 1997), the court stated as follows:

> "[I]t would give us great pause if a right to honest services is violated by every breach of contract or

every misstatement made in the course of dealing.... But we agree that in the absence of actual or potential harm, evidence independent of the alleged scheme must be adduced to show fraudulent intent toward the alleged victims." *Id.* at 667-68 (citations omitted).

The court went on to reverse the mail fraud conviction of the underwriter of a bond issuance who had misrepresented the fact that he would not receive any fee where it was not shown that the defendant either intended to inflict or actually inflicted any harm upon the issuing corporation or the bondholders. *Id.* at 669.

In United States v. Jain, 93 F.3d 436 (8th Cir. 1996), the court reversed a mail fraud conviction based upon § 1346 where the alleged scheme involved a psychiatrist's receipt of kickbacks for referring patients to a particular hospital. The court pointed out that there was no evidence that the psychiatrist's patients, the alleged victims of the scheme, suffered any tangible harm; the psychiatrist and the hospital provided quality services and no patient was financially harmed by the arrangement. *id.* at 441. Although conceding that private sector schemes are covered by § 1346, the court stated as follows:

> "[B]ut the transition from public to private sector in this context raises troublesome issues. In a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated. But in the private sector, most relationships are limited to more concrete matters. When there is no tangible harm to the victim of a private scheme, it is hard to discern

> what intangible "rights" have been violated. For example, what "honest service" do we expect from a used car salesman, beyond a truthful description of the car being sold? Thus, prior intangible rights convictions involving private sector relationships have almost invariably included proof of actual harm to the victims' tangible interests. *Id.* at 441-42.

The court went on to point out that the essence of a scheme to defraud is an intent to harm the victim, and because no such harm was shown in this case, the evidence did not sustain the psychiatrist's mail fraud conviction. *Id.* at 442.

Similarly, in United States v. Sun-Diamond Growers of California, 138 F.3d 961,973 (D.C. Cir. 1998), the court ruled that a mail fraud prosecution under § 1346 based upon a private employee's breach of trust must include a showing that harm was at least contemplated as part of the alleged scheme:

> "In the private sector context, § 1346 poses special risks. Every material act of dishonesty by an employee deprives the employer of that worker's "honest services," yet not every such act is converted into a federal crime by the mere use of the mails or interstate telephone system. Aware of the risk that federal criminal liability could metastasize, we held in *Lemire* that "not every breach of a fiduciary duty works a criminal fraud." *Lemire*, 720 F.2d at 1335, quoting United States v. George, 466 F.2d 508,512(7th Cir. 1973). Rather, "[t]here must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Id.* at 1337. Absent reasonably

> foreseeable economic harm, "[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the (employee] is insufficient to convict. "

These cases clearly establish that a private-sector scheme to defraud which is based upon a deprivation of a right to "honest services" under § 1346 must at the very least contemplate that there be some intended harm to the victim to be within the scope of § 1341.

James Vinyard's testimony indicated that the reason he established Charles Stewart was to allow Sonoco to use the recycled materials in its operations, thereby saving Sonoco money and avoiding the troubles Sonoco thought would arise if it was discovered that Sonoco was using recycled materials. Further, the statements made by James in his interview with the FBI and his sentencing memorandum shows that James certainly did not intend to harm Sonoco, but was seeking to further its interests. The same is true with respect to the alleged recycling scheme; Sonoco was seeking a way to execute a recycling program, and CSE provided them with the opportunity and means of doing that.

While James perhaps should have disclosed his interest in CSE to Sonoco and may have taken steps which tended to prevent Sonoco from discovering his interest, the mere fact of nondisclosure is not enough to support a mail fraud conviction. In this context, it is only where the nondisclosure poses a business risk to the employer that there is a violation of the mail fraud statute. Sun-Diamond, 138 F.3d at 973.

Furthermore, if it can be shown that James and Michael benefitted from any disloyalty of James toward Sonoco, this does not mean that the mail fraud statute was

violated. As in Jain, 93 F.3d at 441-42, the psychiatrist benefitted from his dishonest behavior, but the court nonetheless held that there was not the kind of actual or reasonable possibility of harm to the alleged victims which could support a mail fraud conviction. It has been held that the intent to defraud necessary for a violation of the mail fraud statute cannot be based solely upon the defendants' appropriation of a gain or benefit to themselves, but it must also involve a loss or injury to another. United States v. Frank, 156 F.3d 332, 336 (2d Cir. 1998) (citing United States v. Starr, 816 F.2d 94,101 (2d Cir. 1987)).

The facts of this case do not indicate that the benefit to the Vinyards resulted in any loss or injury to Sonoco. The government did not sustain a case against Michael Vinyard for mail fraud on the basis that Sonoco was deprived of its right to James's honest services.

It also should be pointed out that, with respect to the so-called markup scheme, the mere fact that James did increase the price of the plastic Charles Stewart sold to Sonoco does not show that Sonoco suffered a tangible loss as a result of James's conduct. In United States v. Skeddle, 989 F. Supp. 873 (N.D. Ohio 1997), the court considered a challenge to the sufficiency of a mail fraud indictment which alleged that the defendants had violated their fiduciary duties to a corporation by engaging in undisclosed self-dealing with the corporation and acquiring millions of dollars from the corporation. Although the court upheld the sufficiency of the indictment, it did note that the government was required to demonstrate that the corporation had been injured by the defendants' breach of fiduciary duty. *Id.* at 879.

Moreover, such an injury could be demonstrated only if the jury found that the deals which formed the basis of the indictment were not fair to the corporation. The court

stated that "a contract or transaction which has been proven beyond a reasonable doubt to have caused harm cannot also have been fair," and so the proof would have to nullify the defendants' contentions that their self-dealing with the corporation was nonetheless fair dealing. *Id.*

In the instant case, the facts also indicate that the prices charged to Sonoco by CSE for the plastic were fair prices; DeLoach indicated that Sonoco would be willing to pay a certain amount for the plastic and the prices charged by CSE were within that range. Sonoco clearly received value for its payments, and also received the added benefit of obtaining this plastic without revelations to suppliers or customers. The same is true with respect to the so-called recycling scheme; there is nothing to indicate that Sonoco did not receive what it wanted in return for the services of CSE or that any charges made were not fair. Because the transactions at issue here were not unfair, there was not the kind of injury or harm to Sonoco which is necessary to support a conviction for mail fraud.

The indictment also alleges a scheme to defraud Sonoco "out of money and property." Again, however, a prosecution on this theory would fail for the lack of proof of actual or intended harm to Sonoco. Clearly if such evidence was presented it was only presented in the sentencing of James Vinyard and not to the jury of Michael Vinyard.

In United States D'Amato, 39 F.3d 1249 (2d Cir. 1994), the court explained what is necessary for a violation of the mail fraud statute:

> "The scheme to defraud need not have been successful or complete. Therefore, the victims of the scheme need not have been injured. However, the government must show "that some actual harm or

> injury was contemplated by the schemer.... Because the defendant must intend to harm the fraud's victims, "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution." *Starr, 816* F.2d at 98. "

Thus, a mail fraud prosecution based upon an allegation that there was a scheme to defraud another of money or property also must show that there was some actual or contemplated injury or harm. James Vinyard's pretrial statements, and the statements attributed to him and the facts of this case indicate that no harm was inflicted on Sonoco or intended to be inflicted upon Sonoco. CSE was set up to achieve an objective of Sonoco's and did so without harm to Sonoco. The company was able to avail itself quietly of recycled plastics and was able to execute its recycling program. That the Vinyards profited from this does not mean that mail fraud was committed, especially since the terms of any transactions between Sonoco and CSE were fair. Skeddle, 989 F. Supp. at 879. Therefore, any prosecution of Michael Vinyard under § 1341 should fail.

Another important aspect to consider is that Sonoco made a knowing decision to pay out the money it did to CSE. While they did not know they were paying it to their employee and his brother, they certainly knew they were paying out the money to someone. Repeatedly James Vinyard tried to convince Sonoco that this was money that was being thrown away. Examine the internal memos. The internal memo dated March 1993 says that Harris DeLoach approved of the use of brokers. Other support is given by James's direct supervisor. These memos were all distributed to his chain of command and yet no one objected or directed him to take any other action..

Time after time, James told Sonoco it was throwing

away its money and it didn't have to. A memo dated January 7, 1991, informed the company that there were profits to be made Memos dated from before CSE was created through 1996 all describe the profits to be made and costs saved if the job being done by CSE was done in-house. As Sonoco chose to ignore this advice ,it cannot now be called a victim.

It is clear that the government was not required to even attempt to calculate a loss. They just assumed that if the employee got anything above his salary, money the company paid above that salary was loss. Evidence on the issue of loss was presented in the case of James Vinyard on August 3, 16, and 17, 1999. This evidence was resubmitted by the Government in this case and its previous arguments and theories adopted. Agent Flamini of the FBI was called and testified that he was a certified accountant who had access to the records from Sonoco Products Company for the years 1992 through 1997 when Charles Stewart Enterprises (CSE) was in operation. He was able to discover the total paid to CSE during that period of time as $12,115,785. Agent Flamini then testified that CSE paid out $9,268,741.27 to the various vendors leaving an adjusted earning for CSE of $2,784,946.50.

The Government wishes to end inquiry at that point. The Government could never get past the idea that James Vinyard was not entitled to this money because he was an employee. The Government operates under the idea that James, as an employee, can do nothing against the interest of the company. However this is not the same as "honest services" contemplated by the mail fraud statute. As earlier pointed out in United States v. Frost , *supra* at 368, the employee must have contemplated some concrete business harm to the employer. If he believes he is helping the company then no theft of honest labor. A clear case can

be made for the idea that James Vinyard began this operation for no other reason than to prove to the company that he was right about doing this operation in-house. He tells his brother this is going to be a short term operation and he send multiple memo's to Sonoco telling them of the advantages they are missing. Therefore, James is not hurting the company, or as he told the FBI, he is not intending to defraud Sonoco.

A fair reading of the evidence which was presented to the trial court can also be used to demonstrate that James did not even hurt Sonoco economically. Taking a sheer numbers approach, the actions of CSE did not cost Sonoco Products Company any money. At the trial of Michael Vinyard, the Defendant introduced Defendant's Exhibit 26 showing the before tax profit each year for the High Density Film Division of Sonoco Products Company. This is, of course, the division that James Vinyard worked in and through which all the CSE business was done. Using that exhibit it shows before taxes profit in the years of 1992 through 1997 totaling $136,501,720.81.

Testimony was given by Harris De Loach during James Vinyard's hearing on this issue of what profit might be attributable to the efforts of James Vinyard/CSE . Mr. De Loach is an executive vice president of Sonoco Products Company and has been with them for approximately 15 years and had been in the High Density Film Division from 1989 through 1993. Mr. De Loach was questioned about whether or not there was any profit for Sonoco in using recycled or non-virgin resin rather than virgin resin in the manufacture of its grocery bags. Since this was one of the main functions of CSE, its efforts may have generated profit for Sonoco. After much hesitation, Mr. DeLoach had to admit that a factor in the profitability of the division was the ability to use non-virgin resin. When further

questioned, Mr. De Loach admitted that 3 or 4 % of the profitability of the division would have come from the use of the non-virgin resin. Thus, since CSE was the party responsible for acquiring the non-virgin resin, 3 or 4% of the profitability of the division was due to the efforts of CSE.

Using Sonoco's own profit statements, 3% would generate $4,095,051.62 in profits due to the use of non-virgin resin for the years 1992 through 1997. Therefore, if Sonoco paid CSE $2,784,946.50, Sonoco still made a profit for the years 1992 through 1997 of $1,310,105.12 because of the efforts of James Vinyard/CSE. That is certainly not a loss by any stretch of the imagination.

The likely response by the Government is to argue that Sonoco could have kept the whole $4,095,051.62 but for the actions of the Defendants. This still misses the point. Sonoco did not lose money; they made money. Further, Sonoco got what it bargained for. According to the internal documents, it wanted to be able to buy non-virgin resin without the consumers or their competitors finding out. Sonoco wanted to operate through a broker to maintain confidentiality and to escape the need to create an in-house department that would have required staffing and the costs associated with that function.

A case in point is United States v. Dickler, 64 F.3d 818 (3rd Cir. 1995). In Dickler, a company was involved in reprocessing cars for a bank. The company would seize the car, and was supposed to get three bona fide bids on the car and send these to the bank. The bank would then either reject the bids and sell the car at auction or accept one of the bids and send the title to the company for sale. The problem was that the company was not soliciting bids but making their own bids and then selling the cars for profit. The Court found no loss and held:

> "[W]here the defendant intended to and did give the victim something of value in exchange for what was fraudulently taken, the value of the object or service taken will not reflect the victim's actual loss and another method of calculating actual loss must be used." *Id* at 825

The Court went on to hold:

> "Some fraud involved an intent to walk away with the full amount fraudulently obtained, while other fraud is committed to obtain a contract the fraud perpetrator intends to perform. Mechanical application of the theft guideline in fraud cases would frustrate the legislative purpose of the guidelines and contravene the specific language of the Commission." *Id* at 825

The Fourth Circuit seemed to ignore that it was Sonoco that set the price it would pay for materials. James Vinyard would operate within that frame work. Therefore he gave Sonoco the value, goods and services it desired, within the cost benefit analysis it established. The receipt of full value for goods and service also negates any loss from fraud. In United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997), the defendant was convicted of mail fraud because of his impersonation of a doctor. The Court found that value may be rendered even amid fraudulent conduct and that the patients treated by the defendant did not suffer a loss if they received adequate services. In United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996), the court looked at loss claimed in a mail fraud prosecution of a person who claimed to be a licensed attorney. Again the court reversed the enhancement based on loss pointing out

that a client who obtains a satisfactory contract, settlement, or verdict has received something of value. *Id* at 1311. Having stayed within the budget set by Sonoco, James Vinyard/CSE got it products and services at a very profitable level.

In summary, this is not a poor little old lady who was cheated out of her savings. This is a company that made over **one hundred million dollars in profit in one division.** A company that knew it was sending out payments to a "broker" when its in-house expert kept telling them they could do the job internally. This is not a company who "lost" anything.

The panel's decision to adopt a "reasonably foreseeable" test improperly expands the role of the federal government into regulation of private business transactions. Under such structure, we are now regulating acts of dishonesty alone, and that is not the purpose of the statute.

Other circuits have not been willing to adopt this expansion unless there is proof of actual harm to the victim's tangible interests. *See* United States v. Jain, 93 F.3d 436 (8th Cir. 1996). This case, in particular, is not the factual case that should be used to justify this expansion of the reach of 18 U.S.C. §1346. It is hard to pigeon-hole this case into the same type of conduct that has been considered in other cases since the company made a profit and James acted within the limits of his instructions. To apply broad sweeps to this set of facts will create bad law

2. Prosecutor Misconduct Denied the Defendant a Fair Trial.

The next issue which Petitioner wishes to address is the issue of the prosecution suppressing evidence which

it knew was exculpatory and favorable to the defense, then turning around and taking steps to sponser testimony that it knew or should have know was perjurious. The evidence suppressed was a sentencing memorandum prepared by the defense team for James Vinyard. This document contained a three page statement entitled "Statement of the Defendant." The document, written in the first person and contained in quotation marks, was filed with the court during sentencing hearing on August 3, 1999. The statement contains numerous statements which were substantially different from the testimony his brother gave at trial of Michael Vinyard. This document was not produced by the government, nor delivered to the Defendant.

The Petitioner sought to address this error by means of a Brady claim and arguing that the prosecutors actions in suppressing the evidence and then still using the testimony constituted misconduct sufficent to deny Michael a fair trial.

The three components of any Brady violation are (1) the evidence at issue must be favorable to the defendant whether directly or of impeachment value; (2) it must have been suppressed by the state, whether willfully or inadvertently; and (3) it must be material. United States v. Spicer, 194 F.3d 547 (1999). Should the Defendant meet these three components then his due process rights have been violated and he is entitled to a new trial. Brady v. Maryland, 373 U.S. 83 (1963) If a defendant does not make a specific request, the government must still turn over favorable evidence that is material. United States v. Agurs, 427 U.S. 97, 107-111 (1976) The requirement for turning over such evidence covers not only exculpatory evidence but impeachment evidence. *See* United States v. Bagley, 473 U.S. 667, 676-77 (1985); Giglio v. United States, 405 U.S.150

(1972).

In examining the evidence in question it is clear that the first component is met; i.e. that the evidence is favorable to the defense. The defense of Michael Vinyard focused on the fact that James Vinyard came to him with assurances that this company they were to create was done so at the request of Sonoco and with their knowledge. The first paragraph of this document says that James Vinyard had no fiduciary responsibilities in this regard and that every decision he made had to have the approval of someone above him. The document goes on to discuss in detail how CSE came into being. It describes the process whereby Sonoco chose to use an outside broker to meet its objectives. It even states that his supervisors were informed that James Vinyard and a friend were going to start a business of that nature and could handle the work for Sonoco and this was approved by the supervisor.

Not only is this evidence exculpatory, but it is also of tremendous impeachment value. These statements by James Vinyard as referenced above, contradict numerous statements given by this witness at trial. For example, at trial James Vinyard said that Sonoco had never approved this business and that he informed his brother that if they found out about it he would be fired. This is in direct contradiction to the sentencing memorandum in which James Vinyard asserts he didn't know he was doing anything wrong and that he had informed Sonoco of his involvement.

The seriousness of the impeachment value can be seen by the reaction of the government prosecutor when this document was introduced to the court. Assistant U.S. Attorney Bethea, the same prosecutor in the Michael Vinyard case, viewed these statements as a repudiation of the guilty plea, that James clearly was not accepting

responsibility for his actions and that this statement may even constitute obstruction of justice. The prosecutor even talked about the doubts he now had as to whether or not he was even going to call James Vinyard to the witness stand. The trial court even stated that this sentencing memorandum was a "substantial change of position from what I heard at the time of the guilty plea." The trial court even wondered if they could go forward with the guilty plea. The discussion became so heated that the defense decided to withdraw the document so the sentencing could go forward. Clearly the first component has been met.

The second component under Brady was that the evidence was suppressed by the state. Clearly the Government knew of its existence and, as evidenced in the transcript, actually had a copy of this statement in its possession. Also, it is undisputed that the Defendant made a request for production of such documents. However, even if a specific request for this specific document is not made, the government still must turn over such evidence which is material. Agurs, at 107-111. This burden is an affirmative one and once the prosecutor has information that he objectively and reasonably recognizes as exculpatory or of impeachment value he has a legal and ethical duty to disclose it. Spicer at 558.

The record before the court was that thePetitioner did not have this statement and it was not produced by the prosecution. At the sentencing of Michael Vinyard, some 10 months after the trial, new co-counsel for the Petitioner subpoenaed the sentencing memorandum. Trial Counsel for the Defendant informed the Court that it had not been available for trial. Assistant U.S. Attorney Bethea does not inform the Court that he has produced the document, instead claimed that Petitioner and his trial attorney were present when the issue of this document and its contents

came to light and suggest the Petitioner should have obtained it. The trial court then reviews the memorandum, admits that its content is contrary to some of James Vinyard's testimony at trial and that the Petitioner was entitled to it. This brings us to the issue of whether or not this evidence was material.

In United States v. Ellis, 121 F.3d 908 (4th Cir. 1997), the Court considered the statements of a bank robbery accomplice. In her first statement to the FBI, the accomplice named two different men as being involved. *Id* at 910. Later she changed her testimony and named the defendant. The first statement was never produced. *Id* at 911. The Court examined the history of what was considered material evidence. In footnote five the Court references the three situations, as outlined by the United States Supreme Court in United States v. Agurs *supra*, in which the government's failure to turn over Brady evidence may impact the trial.

> "The first situation, where the prosecution introduced testimony at trial that it knew or should have known was perjured, required reversal if there is any reasonable likelihood that the false testimony could have affected the jury.... In the second case, where the government failed to turn over a specific kind of exculpatory evidence requested by the defense, such non-disclosure was seldom if ever excusable.... Finally, in the third category, where the government failed to turn over exculpatory evidence either not requested or requested in a general way, reversal was necessary only when withholding the evidence would be of sufficient significance to result in the denial of the defendant's right to a fair trial." Ellis at 915.

In the case at bar, an argument can be made for the first two scenarios without much difficulty. First examine the possibility that the prosecution introduced testimony that it knew to be perjured. The Assistant U.S. Attorney clearly knew the impact of the information contained in the sentencing memorandum. He accuses James Vinyard of possibly being guilty of obstruction of justice. The Prosecutor told James Vinyard that he is not going to get his downward departure motion if he sticks to this statement. These statements, actually addressed to the trial court, are nothing more than thinly veiled threats to James Vinyard to ensure he keeps in line as his brother's trial is rapidly approaching. However, this prosecutor also knew that James Vinyard was the key witness in the case. Assistant U.S. Attorney Bethea stated in the sentencing of James Vinyard that he didn't know if he could have gotten a conviction without James Vinyard and his testimony.

Even at the sentencing of James Vinyard, which took place after Michael Vinyard's sentencing, Assistant U.S. Attorney Bethea is still troubled by the content of that sentencing memorandum. He tells the trial court that those statements were not consistent with his guilt and that "it obviously required some work on the part of the government to deal with that issue." The "work" the government did on this problem was to spend four or five full days in prep session with James Vinyard preparing his testimony. A witness telling the truth does not need four or five days to recall the truth. A witness worried about being caught in multiple inconsistent statements <u>does</u> require such preparation.

The government, knowing of these statements, having not produced them, still sponsored this perjured testimony and even tried to protect their star witness at trial. When trial defense counsel questioned James

Vinyard about a statement in the FBI 302 report that "they never had any intention to defraud Sonoco," James Vinyard claimed he didn't understand the legal meaning of defraud. When James Vinyard was pressed harder on this issue, it was the government prosecutor who jumped up to try and save his witness.

As the government had these statements and didn't turn them over, spent four or five days rehearsing the witness' testimony, and then tried to hide the truth from the jury with objections, the criteria for scenario 1 is met. As James Vinyard was the key witness to the government's case by their own admission, such false testimony clearly affected the jury and tainted the result.

The second scenario, where the government failed to turn over a specific kind of exculpatory evidence requested by the defense is also met. The Defendant filed a Motion for Discovery on June 4, 1999. Said motion specifically requested "All statements of Defendant, whether made to the Government or to some other person, in the possession of the Government." The Motion also specifically addresses Brady material including "Evidence concerning acts by the Defendant which are inconsistent with the allegations of the indictment." Clearly the sentencing memorandum would fall into the categories requested by the defendant. Therefore such non-disclosure should not be excused.

Finally, even if it can be argued that the request was only of a general nature, this evidence was material and the government had a burden to disclose it. Materiality looks at the question of whether or not the failure of disclosure undermines the outcome of the trial. Ellis at 914; Van Brocklin, at 594. As previously discussed these statements have both exculpatory value and impeachment value. The sentencing memorandum suggests in two separate places

that Sonoco knew what CSE was doing and had approved. This directly supports the testimony of Michael Vinyard and is completely at odds with the perjured testimony of James Vinyard.

The memorandum is also valuable as impeachment. When cross-examined about his claim to the FBI, James Vinyard said that he didn't understand the legal meaning of the word defraud. How much more effective the examination would have been if trial counsel could have then pointed to the statements in the Sentencing Memorandum which was written only a few weeks before trial. However, Michael Vinyard was denied that opportunity because of the failures and actions of the prosecution. Impeachment alone may have been enough to change the outcome. For as the prosecutor stated, James Vinyard was the key witness and without his testimony, they could not prove the key element of knowledge.

Therefore, under any of the three scenarios described in United States v. Ellis, the Defendant has been denied due process and therefore a fair trial.

The Fourth Circuit fails to consider the relationship between the prosecutorial misconduct and its effect on the trial. Instead the panel focuses only on a techincal reading of the Brady issue only. The Circuit dismisses Michael's arguments of prosecutorial misconduct and overlooks numerous facts and applicable law particularly as it relates to the Government's suppression of the sentencing memorandum.

A perfect example of this failure is the Circuit's determination as to the standard of review. The panel improperly sets the standard of review as that of plain error because Michael did not raise the issues in the district court. However, the facts of this case are such that Michael could not raise these issues before the trial court. While

knowing of the existence of the memorandum, Michael did not receive a copy of the memorandum until after the date that his Notice of Appeal had to be filed.

Although the trial judge stated that Michael was entitled to it, no copies were immediately made available and, in fact took several weeks for such document to finally be made available to Michael's new counsel.

Further, Michael did not know the extent of the Government's actions in suborning perjury until after they were able to obtain the transcript of James' sentencing held after judgment was entered in Michael's case. Said transcript was not obtained until after the time for appeal had passed. Therefore, Michael could not raise this issue before the trial court.

The panel's decision limits its findings to the *Brady* violation. The component not addressed is that the Government was guilty of misconduct in not only suppressing the document, but in permitting false testimony. A reading of the transcript of the hearings on James Vinyard, held before Michael's trial, clearly demonstrates that the statements of James as contained in the sentencing memorandum was grossly inconsistent with his trial testimony.

The prosecutor accused James of obstructing justice and informed him that given the nature of the memorandum, he could not even be used as a witness. This sent a clear message that if James did not change his tune, he would not get the benefit of his plea bargain. This resulted in James withdrawing the memorandum, but instead of giving the document to Michael, the Government works to cover up the potential impact of the document.

The prosecutor happily tells the trial court at James' sentencing of the work the government had to do to deal

with the implications of the sentencing memorandum. The prosecutor tells the trial court of the four or five days of prep work that was done with James Vinyard to prepare his testimony.

A clear example of the impact of that prep-work by the Government is seen in the cross-examination of James Vinyard. When asked to explain the difference between his trial testimony, in which he said that Michael knew from the beginning that the action was illegal, and his previous statements to the FBI in November 1998 and the sentencing memorandum of August 1999, where he repeated stated there was no intent to defraud Sonoco, James, a college educated man, suddenly didn't know of the meaning of the word defraud. Given that kind of concern that the Government had and preparation of this critical witness by that same organization, it is not a mystery that James Vinyard suddenly did not know the meaning of the word "defraud" even though he used this key word and phrase in multiple statements.

Such prosecutorial misconduct is never addressed by the panel's decision although clearly raised in argument to the court. The panel's decision argues that we are merely speculating about the impact of the memorandum yet without stating the reasons concludes "it is unlikely that it would have altered the trial's results."

Given the time and effort put in by the prosecutor in hiding the document and then preparing his witness should it come out, the prosecutor was not speculating on the impact of that document, he knew it was potentially a fatal blow. The prosecutor clearly stated that without James' testimony, no conviction was possible. Even the panel's decision has to acknowledge the fact that the only proof of Michael's knowledge and willing participation in this scheme to defraud is James' assertions. Yet, the impact

of two documents stating there was no intent to defraud is dismissed.

Misconduct of the type describe is particularly critical given the current state of the federal system and its sentencing guidelines. Real risk exists, that given the nature of federal sentencing, that the only method for someone like James to avoid a serious jail sentences is to point the finger at someone else. This risk has not gone unnoticed by the federal courts. United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993).

Given these risk, there is a danger that leniency is sought at the expense of truth. The burden to ensure this does not happen must fall on the Government who has the responsibility to investigate the information of the informant and turn over all documents relating to that testimony. Commonwealth of N. Mariana Island v. Bowie, 243 F.3d 1109 (9th Cir. 2001)

For the Government to fail in that burden or merely become inactive, means that defendants are at the mercy of who ever reaches the prosecutor first and makes a deal, whether or not that deal results in truthful information being disclosed. Michael was held to a specific standard of conduct when the instruction on "willful blindness" was given. In other words, he was held criminally liable and knowledge was imputed to him if he turned a "blind eye" to the activities of his brother.

The same standard must be applied to the prosecutor. A prosecutor cannot avoid his constitutional obligations by remaining willfully ignorant of the facts or the possibility that the inform is only given to secure a sentence concession. Commonwealth of N. Mariana Islands v. Bowie, 243 F.3d at 1114.

Conclusion

For all the reasons stated herein, the Defendant-Appellant requests that his conviction and sentence be vacated and the case remanded to the District Court for a new trial.

Respectfully Submitted

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By:_____

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